

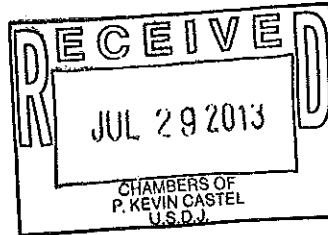
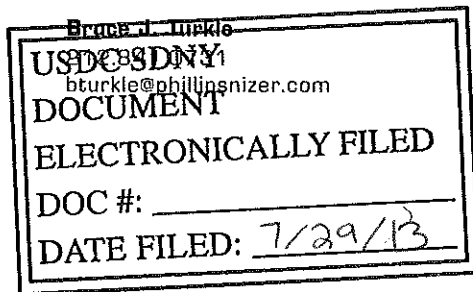
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July 26, 2013

BY HAND

The Hon. P. Kevin Castel
United States District Judge
Southern District of New York
500 Pearl Street
New York, NY 10007-1312

Re: Thea v. Kleinhandler, as Trustee of the
Frederica Fisher Thea Revocable Trust
Case No. 13-cv-04895(PKC)

Dear Judge Castel:

We represent the Defendant in the above-referenced action. In response to the Court's request, we are writing to state that, based on our research, this Court has subject matter jurisdiction and there is complete diversity of citizenship.

The New School Should Be Added As A Party

We also write to respectfully request that the Court direct Plaintiff to bring the New School University, Inc. (the "New School") into this action. According to the Complaint, the late Frederica Thea created the Frederica Fisher Thea Revocable Trust (the "Trust"), years before her death, placed her assets into the Trust, and named "the NEW SCHOOL UNIVERSITY for the benefit of the MANNES SCHOOL OF MUSIC, New York, New York..." as the sole beneficiary thereunder. Plaintiffs allege that the Trust assets should be held for them and not the New School. Accordingly, the New School has a substantial interest in the outcome of this action. Upon information and belief, the New School, which owns and operates the Mannes School of Music, is a New York corporation and, therefore, diversity will not be destroyed by its addition as a party.

The "Probate Exception" To Diversity Jurisdiction Is Inapplicable.

"The 'probate exception' is an historical aspect of federal jurisdiction that holds 'probate matters' are excepted from the scope of federal diversity jurisdiction." Lefkowitz v. Bank of New York, 528 F.3d 102, 105 (2d Cir. 2007)(citing Markham v. Allen, 326 U.S. 490, 494

With respect to the New School, the proper consent -- if there is not a motion conference waived for a motion by plaintiff or defendant with respect to New School -- is filed by August 16. The Court answers that there is no affiliation between "New School University" and NYO. If this is not the case, the parties are to advise by August 2. So on record by August 2. 7-29-13

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Hon. P. Kevin Castel
 July 26, 2013
 Page 2

(1946)). As the Supreme Court recently clarified, “the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent’s estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court.” *Id.* (quoting *Marshall*, *supra*, 547 U.S. at 311-12). See also, *Lifschultz v. Lifschultz*, 2012 U.S. Dist. LEXIS 86639, at *13 (S.D.N.Y. June 20, 2012) (“federal... jurisdiction does lie when a federal court is entertaining suits ‘in favor of creditors...and other claimants against a decedent’s estate to establish their claims so long as the federal court *does not interfere with the probate proceedings* or assume general jurisdiction of the probate or control of the property in the custody of the state court.’”)(quoting *Markham v. Allen*, *supra*, 326 U.S. at 494). [Emphasis in *Lifschultz*].

Accordingly, the Second Circuit instructs that “[f]ollowing *Marshall* we must now hold that so long as a plaintiff is not seeking to have the federal court administer a probate matter or exercise control over a *res* in the custody of a state court, if jurisdiction otherwise lies, then the federal court may, indeed, must, exercise it.” *Lefkowitz v. Bank of New York*, *supra*, 528 F.3d at 106. Here, because the Last Will and Testament of Frederica Fisher Thea has not been probated and none of her property is under the control of a surrogate’s court or any other state court, this Court can exercise jurisdiction over the action.

There is Complete Diversity of Citizenship

For diversity purposes, the citizenship of a trust is determined by identifying the citizenship of the trustee as well as its beneficiaries.’ See *Mills 2011 LLC v. Synovus Bank*, 2013 U.S. Dist. LEXIS 15602, at *19 (S.D.N.Y. Feb. 5, 2013)(discussing *Navarro Savings Ass’n v. Lee*, 446 U.S. 458 (1980) and citing *Emerald Investors Trust v. Gauni Parsippany Partners*, 492 F.3d 192, 205 (3d Cir. 2007)). See generally, *Berry v. Chrysler Group, LLC*, 2013 U.S. Dist. LEXIS 13023, at *8 (S.D. Tex. Jan. 31, 2013); *Constantin Land Trust v. Epic Diving and Services, L.L.C.*, 2013 U.S. Dist. LEXIS 44607, at*17-18 (E.D. La. Mar. 27, 2013)(collecting cases and stating that “[t]hese courts held that the citizenship of a trust is that of all of its ‘members,’ defined as its trustees and beneficiaries”)(citations omitted).

Here, the Trustee of the Trust is a resident of New York, as is the sole beneficiary under the Trust, the New School. Since the Plaintiffs, Donald and Deborah Thea, are alleged to be residents of Massachusetts and California, respectively, there is complete diversity here.

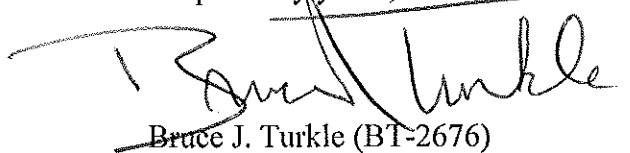
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Hon. P. Kevin Castel
July 26, 2013
Page 3

Conclusion

For the foregoing reasons, Defendants believe that this Court has subject matter jurisdiction over this action and that there is complete diversity. Defendants respectfully request that the Court direct Plaintiffs to bring the New School into this action, the inclusion of which party will not defeat diversity.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Bruce J. Turkle", is written over a horizontal line. The signature is fluid and cursive.

Bruce J. Turkle (BT-2676)

cc: Anthony Viola, Esq. (by pdf)
Zachery Silverman, Esq. (by pdf)